Supreme Court, U.S.
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NO. 96-773

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

PETER HELLAND
Petitioner,
v.

SOUTH BEND COMMUNITY SCHOOL CORPORATION
Respondent.

On Petition for a Writ of Certiorari to the
United State Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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21 pp

QUESTIONS PRESENTED

1. Whether the Seventh Circuit, in a mixed-motive employment case, properly determined that Mr. Helland's poor job performance alone would have justified his removal from the substitute teacher's list?

2. Whether a public school corporation has a compelling interest under the Establishment Clause in restricting a teacher's in-class religious speech and activities in primary and secondary schools that outweighs the teacher's First Amendment right to free speech, academic freedom, or free exercise?

LIST OF PARTIES

The parties to the proceedings below were the Petitioner, Peter Helland, and the Respondent, the South Bend Community School Corporation.

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INTRODUCTION

The Respondent, the South Bend Community School Corporation respectfully requests that this Court deny the Petition for Writ of Certiorari (hereinafter "Petition") to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case. Although some of the questions presented by the Petitioner may be issues of great weight needing resolution by this Court, because of facts unique to this case, it is not the best vehicle to address these issues.

OPINIONS BELOW

The opinion of the court of appeals is reported at 93 F.3d 327 and is attached to the Petition, p. A-1 through A-9. In a supplemental filing, the Petitioner has provided a copy of the unreported district court opinion in the Supplemental Appendix, p. A-17 though A- 30.

JURISDICTION

The Petitioner has adequately stated the jurisdiction of this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Petitioner has adequately cited the constitutional and statutory provisions involved.

STATEMENT OF THE CASE

The statement of the case prepared by the Petitioner is less than completely factually accurate. In accordance with Rule 15.2, the following detailed factual narrative is provided to cure that defect.

I. COURSE OF PROCEEDINGS

On October 28, 1994, the Petitioner, Peter Helland, filed a **pro se** complaint in the United States District Court for the Northern District of Indiana naming as the Defendant, the South Bend Community School Corporation (hereinafter "School"). In the Complaint Mr. Helland asserted that the School's actions in removing him from the School's substitute teacher's list violated his rights under Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000e). Specifically he alleged that he was "terminated for constitutionally proted religious activities and practices [sic] . . .," that he was not "given a chance to tell the truth as [he] saw it," and that his "constitutionally protected Christian style of teaching was perhaps irritating to some people." On January 26, 1995, with the aid of legal counsel, Mr. Helland filed an amended complaint, which in addition to the Title VII claims, also contained allegations that the School's actions violated his First Amendment rights as enforced under 42 U.S.C. § 1983, as well as the Religious Freedom Restoration Act ("RFRA")(42 U.S.C. §2000bb).

On December 7 1995, the District Court entered summary judgment in favor of the School finding that Mr. Helland presented no evidence that his religious beliefs, rather than his religious conduct, were the reason for his removal from the substitute teacher list. It also found that the School Corporation articulated "ample reason, without regard to Mr. Helland's religion," to dismiss him. With respect to the

RFRA claim the District Court held that given his past conduct, Mr. Helland's removal from the substitute teacher's list was the least restrictive means of furthering the School's compelling interest in avoiding an Establishment Clause violation and in having substitute teachers follow lesson plans and curriculum established by the regular classroom teacher and the School. The constitutionality of RFRA was raised but not addressed by the Court because it found that Mr. Helland had failed to offer "sufficient evidence from which a reasonable trier of fact could find that the School Corporation substantially burdened Mr. Helland's exercise of his religion without a compelling interest."

On August 15, 1996, the Seventh Circuit affirmed summary judgment in the School's favor finding that Mr. Helland was properly removed from the substitute teacher list "because he failed to follow lesson plans, failed to control his students, and improperly interjected religion into his classrooms."[1] Helland, 93 F.3d at 331.

II. STATEMENT OF THE FACTS

Mr. Helland was first employed by the School on May 1, 1979, as a substitute teacher. (D. # 22, Resp. to Req. for Adm., No. 1, Application for Substitute Teaching, Exh. "A") He substitute taught for the School during the 1979-1980 school year and then left the School seeking employment at the St. Joseph County Welfare Department between June, 1980 and June, 1985 as a food stamp caseworker. (Id., Resp. to 2nd Int., No. 2(b)) Mr. Helland was rehired as a substitute

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[1] The Petitioner's introduction misstates the holdings of lower courts. Neither Court held that the School could properly prohibit "teachers from carrying their Bibles to School" as stated by Petitioner. (Petition, p. 1) What the School sought to curtail was Mr. Helland's practice of placing his Bible on his desk in the classroom and reading the Bible in the classroom during class time. The Seventh Circuit specifically found that the School never restricted Mr. Helland's right to carry his Bible and to read it during non-class time. "In fact, in the narrative attached to his initial complaint, Helland stated that the School corporation 'never once told me I could not carry my Bible with me to school for personal use.'" Helland, 93 F.3d at 331.

teacher by the School in August of 1985 and remained on the substitute teacher list until November 10, 1993, when he was removed from the list for unsatisfactory performance. (Petition, p. A-14)

Mr. Helland is a deeply religious individual whose "Christian and Gideon beliefs require that he carry a Bible whenever physically possible and he holds a bona fide and sincerely held religious belief and conviction that he must comply with these beliefs." (Petitioner's Seventh Circuit Brief, p. 4) Mr. Helland professes a "Constitutionally protected Christian style of teaching" and posits that "some teachers and administrators did not want me in their public schools because my Christian witness was a bother to them." (D. # 1, Complaint, p. 4) As part of his Christian style of teaching and his Christian witness Mr. Helland has been involved in numerous evangelistic programs both on and off school grounds.[2] (Id.)

When an applicant is approved as a substitute for the School his or her name is added to a substitute teachers list. (D. # 22, Resp. to Req, for Adm., No. 29, Substitute Teachers' Handbook, Exh. "DD") When a teacher requests a substitute an applicant from this list will be called. Pursuant to the School's policy, "if the substitute's work is deemed unsatisfactory by one or more teachers in a particular school, the

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[2] "I have frequently passed out new testaments with my fellow Gideons on the public school sidewalks throughout the eight years I substitute taught." (D. # 1, Complaint p. 4) In connection with these activities Mr. Helland was arrested in October of 1983 (when he was not employed by the School) for trespass when he was involved in proselyting and passing out religious tracts on and around the grounds of South Bend Riley High School (D. # 36, 10/9/93 South Bend Tribune Article) Mr. Helland was an active participant in Young Life "ministering to Adams and Clay high school students," (D. 35, Helland Aff'd., p. 1, para. 3) and was also active as a lay minister at the St. Joseph County Jail as well as the Parkview and South Bend Juvenile facilities. (D. # 1, Complaint p. 4, Narrative; Appellant's Brief, p. 4) The School does not dispute the strength, depth or wisdom of Mr. Helland's religious convictions, it only questions the appropriateness of the times and places he has chosen to exercise them, and in particular whether it was appropriate for him to do so in the School's classrooms during class time.

principal may recommend to the Personnel Department that the substitute teacher not be sent to that school in the future." (Id., p. 7) A form for evaluating the substitute teacher's performance is attached to the Handbook and provided to teachers. (Id., App. B) Because there is no requirement that evaluations of substitutes be done, these forms are used almost exclusively to report extremely positive or e..tremely negative behavior by substitutes as well as to make the request, mentioned above, that the substitute not return to a particular school or class.[3] When a substitute teacher is found unsatisfactory in many buildings, that teacher may be removed from the substitute list entirely. (Id.)

During the period of time Mr. Helland substitute taught, several teachers and principals sent negative evaluations to the School's Human Resources Department regarding Mr. Helland's performance, and asked that he not be permitted to substitute teach for their classes and/or in their buildings. Mr. Helland concedes that many such complaints were in his personnel file, but contests the truth of the complaints or the motivations of the people making the complaints. These performance based complaints, as well as Mr. Helland's refusal to stop interjecting religion into the classroom despite repeated warnings, culminated in the School's decision to remove Mr. Helland from the substitute teacher's

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[3] Mr. Helland argues that because he had 720 teaching experiences and only received several highly negative evaluations, the remainder must have been positive. This is not true. The written negative evaluations represented those teachers and principals who were so dissatisfied with Mr. Helland that they were willing, in writing, to demand that he never return to their class or school. On the other occasions the teachers simply chose not to fill out any evaluations, which was their option. (Plaintiff's Affidavit List , Barr Aff'd., p. 2, para. 4) Mr. Helland made no proffer of evidence to indicate that any other evaluations even existed, much less were available for review. The statement in the Petition that "[t]he Corporation refused to produce the 713 positive evaluations" (Petition, p. 4) is untrue and designed to mislead the Court. Mr. Helland never even requested such documents from the School during discovery, much less produced them to the district court in opposition to the School's summary judgment motion as he was obligated to do. Celotex Corp. v. Catrett, 477 U.S. 317, 322-325 (1986)

list entirely on November 10, 1993. The individual who made the decision to remove Mr. Helland from the substitute teacher's list was John Hemphill, Assistant Director of Human Resource and Services. Mr. Hemphill made his decision based on the following incidents and complaints documented in Mr. Helland's personnel file:

1. On May 10 and 11, 1979, Mr. Helland substituted at Clay Middle School. He received a negative evaluation for his performance during this assignment for the quality of instruction, discipline, and adaptability. The school principal, Ralph Komasinski, also commented that during class Mr. Helland read the Bible to students and distributed "religious and sexually oriented material" to the class. (D. # 22, Resp. to Req. for Adm., No. 2, 5/11/79 Substitute Teacher Evaluation, Exh. "B"; Resp. to 1st Int., No. 1(a)) This material included a document titled the "Gay Blade" which was a multi-page tract preaching about the sin of homosexuality, containing a short version of the biblical story of Lot, and containing explicit descriptions of homosexual acts. (Id.) Mr. Helland acknowledged having this religious material on his desk accessible to students and that students read it: "[O]ne student in my class was given a chance to read a piece of my literature. I let him read it for only five minutes before I then took it back." (D. # 35, Helland Aff'd., p. 3, para. 1)
2. On September 16 and again on October 11, 1985, Mr. Helland substituted at Edison Middle School and received an unsatisfactory mark in the discipline category. The teacher and principal requested that Mr. Helland not be permitted to substitute again. (D. # 22, Resp. to Req. for Adm., No. 4, Substitute Teacher

Evaluation, Exh. "D") Mr. Helland admits this. (D. # 35, Helland Aff'd., p. 3, para. 3)[4]

3. In his own affidavit in opposition to summary judgement Mr. Helland stated that "in September of 1986, the principal at Darden reported to the downtown office that I had read the Bible to a sixth grade class." In connection with this complaint, Mr. Helland stated that: "I admitted to Mr. William Roberts [the School's personnel director] that I read about three verses of Scripture because the children had been begging me all day to read something from my Bible. . . . He said that I absolutely could not read the Bible. **He further stated that he would have no choice but to fire me if I did it again. Now I knew what the School's policy was.**" (Id., p. 3, para. 4)(emphasis and parenthetical supplied).[5]

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[4] Throughout his Petition Mr. Helland complains that the School failed to follow a School policy in that it never reviewed the negative evaluations with him or gave him an opportunity to respond to them. However, Mr. Helland was a substitute teacher, and the School policy to which he refers requiring such a review with the teacher only applies to the annual evaluations of regular tenured teachers, not the occasional evaluations of substitute teachers. (See Barr Aff'd., p. 2) The evaluations were placed in Mr. Helland's personnel file which was available for his review at any time as noted in his own materials. (Petition, p. 8, n. 4 "Mr. Helland did not learn it existed until he initiated a review of his file."). Furthermore, he was also notified when he was barred from a particular school. Once he had that notification, he could simply ask to see his personnel file to determine the reason why he was banned, as he did when he was banned from Adams High School in 1992. (D. # 22, Resp. to Req. for Adm., No. 22, Helland's Letter to Dr. Calvin, p. 1, Exh. "W")

[5] This incident highlights the fact that Mr. Helland through his activities had, as early as 1986, become so identified with Christian religious beliefs that students were, to use his own language, "begging [him] all day to read from his Bible" in class. The fact that the students understood Mr. Helland's Christian religious beliefs and knew he would express them in the classroom is evident from the affidavits of the students tendered by Mr. Helland. See Plaintiff's Affidavit List, Response to Question No. 10, Exhibits No. 14 (Beavo Aff'd.); No. 15 (Payne Aff'd.); No. 19 (Perry Aff'd.); No. 20 (Johnson Aff'd.); No. 21 (Bond Aff'd.); No. 22 (Ingram Aff'd.); No. 23 (Adams Aff'd.); No. 24 (Georgette Adams Aff'd.); No. 25 (Pearson Aff'd.); No. 26 (Dempsey Aff'd.); and No. 27 (Pierson Aff'd.). In

4. On October 16, 1986, Mr. Helland was assigned to substitute at Washington High School. His performance for this assignment was evaluated as unsatisfactory in three out of four categories. Additionally, the principal commented that Mr. Helland read the Bible during class to students[6], allowed students to leave the room without a pass, and lost the answer book for the student workbook. (Id., No. 5, Substitute Teacher Evaluation, Exh. "E"; D. # 22) Mr. Helland admits that: "I had been reading my Bible silently during my breaks." (D. # 22, Resp. to 1st Int., No. 1).

5. On April 20, 1987, Mr. Helland was given an unsatisfactory evaluation for the quality of his performance as a substitute at Clay Middle School on April 9 and 10, 1987. The school principal complained that Mr. Helland read the Bible[7] to the students during class and requested he not be sent back to Clay Middle School. (D. # 22, Resp. to Req. for Adm., No. 6, Substitute Teacher Evaluation, Exh. "F") Mr. Helland admits that: "I had silently read my Bible at my desk while the class finished a written assignment." (D. # 22, Resp. to 1st Int., No. 1).

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fact, every student-affidavit introduced by the Petitioner, except for No. 16 (Johnson Aff'd.) indicates that the students knew of Mr. Helland's evangelical Christian beliefs and his desire to propagate these beliefs and as a consequence sought him out for religious guidance. This particular incident also illustrated the reason the School was concerned over Mr. Helland bringing his Bible into the class and reading it during class time.

[6] Please note that his reading the Bible in class occurred **after** Mr. Helland admitted that he had been warned and after he said "[n]ow I knew what the School's policy was." This directly contradicts note 3 of the Petition where it is asserted that "Mr. Helland has always sought to fully comply with the directives of the Corporation." (Petition, p. 7 n. 3)

[7] See note 6.

6. On November 18, 1987, Mr. Helland was placed as a substitute teacher in a special education class at Adams High School. During that assignment he gave his car keys to a student who had been suspended from school grounds. Mr. Helland allowed the student to remain in his car so that he could drive the student home after school. A security guard found that student and several others sitting in Mr. Helland's car. Mr. Helland stated he did not realize that giving his car keys to the suspended student would create a problem. The teacher who submitted the evaluation of Mr. Helland requested that Mr. Helland not be assigned to Adams High School in the future due to his lack of understanding of high school students. As a result, on December 1, 1987, Mr. Przybysz, principal of Adams High School, requested that Mr. Helland not be assigned to Adams High School special education classes. (D. # 22, Resp. to Req. for Adm., No. 7, Inter-Office Memorandum, Exh. "G")

7. According to his own sworn testimony, on February 2, 1988, Mr. Helland discussed the Bible with a number of male students during class: "[I] had a detailed conversation with (6) six males, in class regarding Jesus. The males approached me that day and questioned my beliefs, and I told them." (Id., No. 24, EEOC Affidavit by Mr. Helland, Exh. "Y", p. 1; D. # 35, Helland Aff'd., p. 5-6)

8. On October 9, 1989, Mr. Helland substituted at Adams High School. His performance was poor in three categories: teacher performance, behavior and record keeping. The teacher noted that Mr. Helland did not follow the lesson plans she left and he discussed religion with the class instead of letting them study.

She requested he not be assigned to her classroom again. (D. # 22, Resp. to Req. for Adm., No. 8, Teacher Evaluation of Substitute Performance, Exh. "H")

9. On November 13, 1989, Mr. Helland was assigned to substitute at Adams High School. He received a poor teacher performance evaluation because he did not follow the lesson plans and he did not explain any of the lesson plan to the students. (D. # 22, Resp. to Req. for Adm., No. 9, Teacher Evaluation of Substitute Performance, Exh. "I") Mr. Helland admits this. (D. # 35, Helland Aff'd., p. 4, para 4)

10. On January 24, 1992, Mr. Helland substituted at Nuner Elementary School. He received a poor evaluation for management of classroom behavior. Mr. Helland drank a Millers' Sharp Beer during class and left the bottle on his desk throughout the day. Although the bottle contained a non-alcoholic beverage, the bottle said "Millers" and the students believed it contained beer. The teacher requested he not be returned to her classroom. (D. # 22, Resp. to Req. for Adm., No. 10, Teacher Evaluation of Substitute Performance, Exh. "J") "Plaintiff admits that he drank a Millers' Sharp Beer in the presence of the students . . . ." (D. # 35, Helland Aff'd., p. 4, para. 4).

11. On March 30, 1992, Mr. Helland substituted at Adams High School. He received a poor evaluation for this assignment because he did not follow the lesson plan left for him and the students complained about his behavior. (D. # 22, Resp. to Req. for Adm., No. 11, Teacher Evaluation of Substitute Performance, Exh. "K")

12. On April 27, 1992 through April 29, 1992, Mr. Helland substituted at Adams High School. The building principal requested that he not be reassigned to his building as a substitute. (Id., No. 12, Teacher Evaluation of Substitute Performance, Exh. "L") Despite this request, on September 4, 1992, Mr. Helland again substituted at Adams High School. He received a poor evaluation for teacher performance, behavior, and record keeping. The evaluation form states he did not follow the instructions written for the substitute. The teacher requested he not be returned to her class as a substitute. (Id., No. 13, Teacher Evaluation of Substitute Performance, Exh. "M")

13. On October 6, 1992, Mr. Helland was assigned to Tarkington Elementary School. He received a poor evaluation for teacher performance and behavior management. The evaluation explained Mr. Helland did not follow the lesson plans and that the class was so "loud and out of control" that adjoining classes were disturbed. It was requested that he not be reassigned to that building. (Id., No. 13(duplicate), Teacher Evaluation of Substitute Performance, Exh. "N")

14. In addition to these specific evaluation forms, Mr. Phebus, principal of John Adams High School wrote a letter to the School Human Resources Department on November 16, 1992, requesting that because of his problems Mr. Helland no longer be assigned to Adams High School as a substitute teacher. (Id., No. 14, 11/16/92 Inter-Office Memorandum, Exh. "O"; Resp. to 1st Int., No. 1(a)) According to Mr. Helland, Mr. Phebus was concerned about Mr. Helland's involvement in "passing out the religious brochures that were left

scattered in the halls." Mr. Helland had authored an article in the brochures. (D. # 35, Helland Aff'd., p. 7, para. 1-2)

15. As a consequence of this situation, on December 3, 1992, Mr. Helland met with Mr. Hemphill and was warned of "our concern about [him] passing out religious material, reading the Bible in the classroom etc. I informed him that if it continued we would no longer use him as a Substitute Teacher." Mr. Helland was also told that: "This should be considered as his last warning ... ." (D. # 22, Resp. to Req. for Adm., No. 15, 12/3/92 Inter-Office Memorandum, Exh. "P") Mr. Helland acknowledges this conversation. (D. # 35, Helland Aff'd., p. 8, para. 1)

16. In April of 1993, while substituting at Adams High School, Mr. Helland again interjected religious materials into the classroom. The students complained that: "He handed out pamphlets on the Bible and preached on various Bible passages while in the class[8]. ... read his Bible to himself at the teachers desk ... [K]ept pretty much to himself unless asked a question, and in that case he would talk about religion . . . The school is a place for education not worship." (D. # 22, Resp. to Req. for Adm., No. 18, 4/26/93 Inter-Office Memorandum, Exh. "S")

17. Due to his continuing problems, and after having been warned several times not to interject his religious beliefs into the classroom, on April 14, 1993, Mr, Helland met with the acting Superintendent, Ralph Komasinski, to discuss his religious activities and other classroom

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[8] See note 6.

problems. On May 20, 1993, Superintendent Komasinski, wrote Mr. Helland notifying him of his teaching deficiencies and expressing concern over Mr. Helland's defiant refusal to follow directives not to depart from the lesson plan left for him and interject religious materials into the class. Mr. Helland was warned that termination was imminent, should he fail to heed the directives. (Respondent's Appendix, p. A-1 through A-2) Mr. Helland acknowledges this meeting and receiving this letter. (D. # 35, Helland Aff'd., p. 7, para. 3-4)

18. Following this warning, sometime in late May or early June, 1993, Mr. Helland was involved in passing out religious newspapers in school which stated, in part, "Commander-in-Chief of the Universe Jesus Is He in charge of YOUR life?" These materials were given to students during classes and both parents and students complained about the distribution of these materials at school. (D. # 22, Resp. to Req. for Adm., No. 19, Inter-Office Memorandum, Exh. "T")

19. On October 28, 1993, while substitute teaching at Tarkington Elementary School, Mr. Helland, ignoring the prepared lesson plan, conducted a discussion of his religious beliefs and creationism with a fifth grade science class. He also apparently brought a Bible to class and read from the Bible. (Id., No. 20, 11/8/93 Inter-Office Memorandum, Exh. "U"; D. # 22, Resp. to 1st Int., No. 1). He specifically admitted this incident in his affidavit (D. # 35, Helland Aff'd., p. 9-10) as well as his Complaint. In his letter to the Superintendent following his removal from the substitute teaching list Mr. Helland stated: "She [the Principal at Tarkington

> Elementary] called me into her office and I told her something about the boy who had become upset as I was teaching the idea of evolution. I assured him that it was only a theory that we evolved from monkeys. That thought still did not comfort him because just the idea that we evolved from monkeys seemed to greatly disturb him. I then proceeded to assure him that I too believed in the Bible and in Jesus and that God created us in His image like the Bible teaches. When I gave him this assurance I added that I could get in trouble talking about Jesus and the Bible in school. So I told them not to go around saying I was teaching the Bible because that is not what I was doing. They said they would not tell if I did not give them an assignment. Since it was Friday and no assignment was issued, I said ok." (D. # 22, Resp. to Req. for Adm., No. 22, 12/22/93 Letter to Supt. Calvin, Exh. "W")[9]

Mr. Helland had thus been warned as early as September of 1986 by the School's personnel director to stop interjecting religion into the classroom and to stop reading his Bible in class or "he would have no choice but to fire me if I did it again,"[10] yet he continued to do it.

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[9] In his pro se brief in opposition to the School's motion for summary judgment Mr. Helland admitted that he interjected creationism into this class but argues that it was his duty to interject his Christian perspective: "I was teaching Mr. Seng's class about evolution just before I was fired. However, when children ask or when it is appropriate I feel it is part of my duty as a teacher to inform them in an objective manner about what scientist say about creationism. I believe that children deserve a well-rounded education . . . ." (D. # 34, Plaintiff's Brief, p. 8)

[10] In his Petition Mr. Helland takes the Seventh Circuit to task for finding "numerous warnings that did not exist." (Petition, p. 9) Mr. Helland erroneously states to this Court that "[o]nly once, in a discussion recorded in the December memo, did the school make anything like a 'warning' to Mr. Helland before he filed his EEOC Complaint." (Id.) It is hard to imagine a more explicit warning than that delivered by Mr. Roberts in 1986, yet even though Mr. Helland admits receiving this warning in all of the other pleadings filed in

Mr. Helland was again specifically warned in December of 1992 by Mr. Hemphill to stop interjecting religion into the classroom as well as being notified of his classroom deficiencies, yet again he failed to heed this warning despite the fact that "[t]his should be considered as his last warning." In April of 1993, the Superintendent met with him and in May of 1993, in writing, warned him that his teaching performance was deficient and that he should stop interjecting his religious beliefs into the classroom or the School would take action, yet Mr. Helland continued to ignore the warnings.

After seven years of toleration and attempted accommodation, despite repeated flagrant violations of directives, as a direct consequence of the incident on October 28, 1993, the School was left with no other choice. On November 10, 1993, Mr. Helland was notified by Mr. Hemphill that his name had been removed from the substitute teacher's list "due to not following lesson plans, problems with classroom management and on some occasions you interjected reading religious-oriented materials into portions of your classroom presentation." (Petitioner's Appendix, pp. A-14 through 15)

REASONS FOR DENYING THE WRIT

I. UTILIZING A MIXED-MOTIVE ANALYSIS, THE SCHOOL'S ACTIONS WERE PROPER.

The Petitioner focuses his argument exclusively on the constitutional issues, ignoring the fact that Mr. Helland's refusal to stop interjecting religious activities and speech into the classroom was but one of <u>two</u> reasons for his removal from the substitute teacher's list.

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this matter, the Petition not only omits this warning, but asserts that it never existed.

The other reason, as noted in the Seventh Circuit's opinion, was "that Helland's work as a substitute teacher was subpar." Helland, 93 F.3d at 332. In Mt. Healthy City School District Board of Education v. Fred Doyle, 429 U.S. 274 (1977) this Court held that in a mixed-motive case, where one basis for the decision is lawful and the other unlawful (an alleged constitutional violation), "if the lawful reason alone would have sufficed to justify the firing, the employee could not prevail in a suit against the employer." McKennon v. Nashville Banner Publishing Company, 513 U.S. 352, 115 S.Ct. 879, 885 (1995)(citing Mt. Healthy, 429 U.S. at 284-287).

In the present case, both the Seventh Circuit and the district court specifically found that the School presented and proved two distinct reasons for Mr. Helland's removal from the substitute teacher's list: (1) "that his work as a substitute teacher was subpar;" and, that (2) "he defied repeated warnings against interjecting his religious beliefs into the classrooms." Helland, 93 F.3d at 330. The fact that two reasons were involved make this a mixed-motive case. The Seventh Circuit also specifically found that the lawful reason, Mr. Helland's subpar substitute teaching performance, alone would have justified Mr. Helland's removal from the substitute teacher's list. Id. Based on this finding, under McKennon and Mt. Healthy, Mr. Helland "could not prevail in a suit against the [School]." McKennon, 115 S.Ct at 885 (parenthetical supplied).

This analysis is an initial hurdle that Mr. Helland must overcome prior to even presenting the constitutional issues to this Court. Yet he never even raises the issue in the Petition. Because there is no need to address the constitutional issues relating to Mr. Helland's religious activities in the classroom, as the lawful reason alone justified the removal, the Petition should be denied.

II. THE ACADEMIC FREEDOM ISSUE WAS NOT RAISED IN THE LOWER COURTS AND THUS IS NOT RIPE FOR REVIEW.

In his Petition, Mr. Helland places all of his legal apples in the "academic freedom" basket. He asserts that because he had a First Amendment right to "academic freedom" to interject his religious beliefs into the classroom, the School's actions in discharging him for this activity could not, by definition, be a legitimate non-discriminatory reason under McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). However, this argument suffers from a fatal defect; it was never raised in the lower courts. In Youakim v. Miller, 425 U.S. 231 (1976) this Court stated: "Ordinarily, this Court does not decide questions not raised or resolved in the lower court." Id., 425 U.S. at 234. Because the entire thrust of the Petition is premised upon an argument that was not presented to the lower courts, the Petition should be denied.

III. THE UNIQUE FACTS OF THIS CASE PRECLUDE THE COURT FROM DIRECTLY ADDRESSING THE ISSUES RAISED IN THE PETITION.

Even if this Court were to find that the Free Exercise/Establishment Clause issues are important and properly before this Court, the facts underlying this case make it an inappropriate vehicle for deciding these important issues.

The parties are in agreement that there is a great deal of confusion in the lower courts and in the Nation's primary and secondary schools over the obligations the Establishment Clause imposes on them

to avoid the establishment of a religious viewpoint in the classroom when this concern is balanced with the rights of teachers and students to free speech and the free exercise of religion also guaranteed under the First Amendment. However, despite this confusion, the Respondent respectfully suggests that this is not the appropriate case to resolve those issues.

A. Mr. Helland As A Substitute Teacher.

The primary problem with squarely addressing the issues presented in the Petition is the fact that Mr. Helland is not a regular teacher with the power to create a curriculum and a lesson plan for the class. Rather, Mr. Helland is a substitute teacher. As noted in the School's Substitute Teacher Handbook, Mr. Helland as a substitute teacher was required to "[k]eep the atmosphere of the room as nearly normal as possible by following the regularly scheduled activities and teaching plans." (D. # 22, Resp. to Req. for Adm., No. 29, Substitute Teachers' Handbook, Exh. "DD", p. 10)

This Court's cases discussing the right to "academic freedom," Keyishian v. Board of Regents of the University of the State of New York, 385 U.S. 589, 603 (1967); Wieman v. Updegraff, 344 U.S. 183, 195 (1952)(Frankfurter, J. concurring), do so as a necessary adjunct of the teacher's right to control the curriculum in the classroom. Mr. Helland, as a substitute teacher, had no such right of curricular control. He was required to follow the lesson plans left for him. Therefore concerns over stifling "[t]he classroom [as] peculiarly the `marketplace of ideas'" Keyishian, 385 U.S. at 603 (parenthetical supplied), simply are not raised by the specter of stifling Mr. Helland's speech. The classrooms to which he is assigned are never a marketplace for his ideas. Rather his assigned job is to simply transmit another teacher's ideas to the class through that teacher's prepared lesson plans. Because

Mr. Helland, as a substitute teacher, has no right of curricular control, the academic freedom argument is inapposite. Because the academic freedom issue is inapposite, the Petition should be denied to the extent it seeks to have this Court review the case on that basis.

B. Mr. Helland Was Not Removed For Any Single Isolated Incident, But Rather For The Cumulative Effect Of His Activities Which Improperly Established Religion In The Classrooms In Which He Taught.

In the Petition Mr. Helland focuses on several isolated incidents (carrying the Bible, reading the Bible in class silently, and departing from the assigned lesson plan to discuss creationism in class) and argues that each individually is constitutionally permissible. However, it is not the isolated incidents that caused Mr. Helland to be removed from the substitute teacher's list. Rather it was the cumulative effect of these incidents and a number of others (handing out religious pamphlets in school and in class, discussing specific religious beliefs in class outside of the lesson plan, reading the Bible aloud in class, and his repeated defiance of directive to refrain from this type of conduct) that caused Mr. Helland to become so entangled in religion that ultimately the School had no choice but to remove him from the substitute teacher's list. The Petition utterly ignores this salient fact, seeking to have this Court address each isolated incident in a vacuum and arguing that each incident, in and of itself, does not violate the Establishment Clause, while ignoring the fact that the cumulative effect of all of the activities inextricably entangled the School, through its representative, Mr. Helland, in religious activity, and thus creating an Establishment Clause violation.

Thus even if each of the isolated issues are important ones on which the Court wishes to render an opinion, because Mr. Helland was removed not for any single incident, but rather because of the cumulative effect of his activities, each of the issues raised in the Petition are not squarely presented to the Court and therefore the Petition should be denied to the extent it seeks a ruling on each isolated issue.

IV. THE PETITIONER'S PROPOSED ACADEMIC FREEDOM ANALYSIS IS INAPPLICABLE.

At the heart of his argument, the Petitioner proposes taking the "academic freedom" analysis crafted by this Court for application to professors in colleges and universities and apply it to primary and secondary school teachers who engage in religious speech or activities and find that those activities are protected. See e.g. Keyishian, 385 U.S. at 603 and Wieman, 344 U.S. at 195. The flaw in relying on these cases to support an extension of this proposition into the primary and secondary schools, at least in the context of religious speech, is that this argument utterly ignores several fundamental distinctions between colleges and universities and primary and secondary schools.

With respect to college and university students, this Court has recognized that the danger of an Establishment Clause violation caused by a professor's religious speech and choice of religious curriculum is low. Tilton v. Richardson, 403 U.S. 672, 686 (1971)("There is substance to the contention that college students are less impressionable and less susceptible to religious indoctrination. Common observation would seem to support that view . . . . The skepticism of the college student is not an inconsiderable barrier to any attempt or tendency to subvert the limitations [prohibiting religious instruction]. Furthermore,

by their very nature, college and postgraduate courses tend to limit the opportunities for sectarian influences.") See also Widmar v. Vincent, 454 U.S. 263, 274 n. 17 (1981)(Noting that college and university students are young adults and "are less impressionable than younger students."). In contrast, this Court has noted that with primary and secondary school students the danger of an Establishment Clause violation caused by a teacher's religious speech and choice of religious curriculum is high. Grand Rapids School District v. Ball, 473 U.S. 373, 383 (1985)("[T]he government's activities in this area [of religion in the public schools] can have a magnified impact on impressionable young minds.")

This Court discussed the basis for the distinction in detail in Edwards v. Aguillard, 482 U.S. 578 (1987):

> The Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools. Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family. Students in such institutions are impressionable and their attendance is involuntary. The State exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure.
>
> 5. The potential for undue influence is far less significant with regard to college students who voluntarily enroll in courses. "This distinction

> warrants a difference in constitutional results." Thus, for instance, the Court has not questioned the authority of state colleges and universities to offer courses on religion of theology.

Edwards, 482 U.S. at 584 (citations omitted).[11]

The Edwards case thus establishes three reasons for drawing a distinction between religious activities by teachers in primary and secondary schools versus those in colleges and universities: (1) the compulsion imposed due to mandatory attendance laws in primary and secondary schools; (2) the immaturity due to the age of the students involved in primary and secondary school classes; and, (3) the role model status of teachers in primary and secondary schools. Because of these three elements, the balance between a teacher's right to academic freedom and the School's interest in avoiding an Establishment Clause violation almost always tips in favor of the School in the primary and secondary schools context. Thus for example, in Lee v. Weisman, 505 U.S. 577 (1992) this Court held that a school violated the Establishment Clause by presenting an invocation and benediction by a member of the clergy during high school and middle school graduation ceremonies:

> As we have observed before, there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in elementary and secondary public schools. We do not address whether that choice [to attend the graduation program despite the religious activities] is acceptable if the affected citizens are

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[11] Curiously, the Petitioner's counsel never even cites the Edwards case, despite his familiarity with it as Counsel of Record, and its applicability to this case.

> mature adults, but we think the State may not, consistent with the Establishment Clause, place primary and secondary school children in this position. Research in psychology supports the common assumption that adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention.

Id., 505 U.S. at 587 (parenthetical supplied). In this context the Court also noted that "the principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause." Id., 505 U.S. at 586-87.

This Court has also noted that the "symbolism of a union between church and state is most likely to influence children of tender years, whose experience is limited and whose beliefs consequently are the function of environment as much as free and voluntary choice." Grand Rapids School District, supra., 473 U.S. at 390. Thus, contrary to the Petitioner's suggestion, the academic freedom analysis, at least with respect to religious speech, is limited by this Court's prior decisions to young adults in colleges and universities where a right to academic freedom overrides Establishment Clause concerns. It should not and can not, consistent with the above referenced cases, be applied to the Nation's primary and secondary schools because Establishment Clause concerns outweigh those rights in the lower schools. The Seventh Circuit's ruling is consistent with this proposition, and the Petition should be denied.

V. THERE IS NO CONFLICT AMONG THE CIRCUITS.

Not only is the Seventh Circuit's decision consistent with this Court's rulings in this area, it is also consistent with the decisions of each of the other circuits to address the issue.[12] For example, applying the principles created by this Court in the cases cited in the preceding subsection, the Ninth Circuit in Peloza v. Capistrano Unified School Dist., 37 F.3d 517 (9th Cir. 1994) upheld the defendant school's decision to prohibit the teacher from discussing creationism and other religious matters in the classroom as well as its direction to him to "refrain from any attempt to convert students to Christianity or initiating conversations about your religious beliefs during instructional time . . . ." Id., 37 F.3d at 522. The Ninth Circuit reasoned:

> While at the high school, whether he is in the classroom or outside of it during the contract time, Peloza is not just any ordinary citizen. He is a teacher. He is one of those especially respected persons chosen to teach in the high school's classroom. He is clothed with the mantle of one who imparts knowledge and wisdom. His expressions of opinion are all the more believable

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[12] The Petitioner cites the Fifth Circuit case of Doe v. Duncanville Independent School District, 70 F.3d 402 (5th Cir. 1995), for the proposition that there is a conflict. This is untrue. The Petitioner simply ignores pages 406-407 of the opinion where the Fifth Circuit held that pre-basketball game prayers led by a teacher and coach constituted an impermissible Establishment Clause violation. The court did permit the school choir to retain its religious theme song, **The Lord Bless You and Keep You**, because it found that 60% to 70% of serious choral music was based on sacred themes or text and that there was a secular purpose to this song. Id., 70 F.3d at 407. The citation to Grove v. Mead School District No. 354, 753 F.2d 1528 (9th Cir. 1985) is similarly inapposite, as the court specifically noted that "[t]he central theme of the novel is life, especially racism, from the perspective of a teenage boy in a working class black family. Comment on religion is a very minor portion of the book. Its primary effect is secular." Id., 753 F.2d at 1534. The citation to Florey v. Sioux Falls School District, 49-5, 619 F.2d 1311 (8th Cir. 1980) is also inapposite as that case dealt with secular materials, i.e. Christmas carols, and did not discuss the use of religious materials as part of a school's curriculum. However, even if it did, the question here is not whether religious materials may be used as part of a school created curriculum, the question here is whether a teacher may depart from the school's curriculum to interject his own religious materials or comments. The circuits are unanimous that a teacher may not do this.

> because he is a teacher. The likelihood of high school students equating his views with those of the school is substantial. To permit him to discuss his religious beliefs with students during school time on school grounds would violate the Establishment Clause of the First Amendment. Such speech would not have a secular purpose, would have the primary effect of advancing religion, and would entangle the school with religion. In sum it would flunk all three parts of the test articulated in Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971).

Peloza, 37 F.3d at 522. Mr. Helland's discussions, including the October 28, 1993 creationism discussion suffer from the same defects.

In Roberts v. Madigan, 921 F.2d 1047 (10th Cir. 1990), the Tenth Circuit addressed the issue of whether a school could prohibit a teacher from silently reading a Bible at his desk and keeping a copy of the Bible on his desk during class time as the least restrictive means of meeting its compelling interest in avoiding the endorsement of a particular religion. In finding that the school could do so, the Ninth Circuit noted:

> We believe that the district court also properly concluded that Mr. Robert's actions, when viewed in their entirety, had the primary effect of communicating a message of endorsement of a religion to the impressionable ten-, eleven-, and twelve-year-old children in his class.
>
> > The meaning of a statement to its audience depends both on the intention of the speaker and on the `objective'

> meaning of the statement in the community . . . . If the audience is large, as it always is when government `speaks' by word or deed, some portion of the audience will inevitably receive a message determined by the `objective' content of the statement, and some portion will inevitably receive the intended message. Examination of both the subjective and the objective components of the message communicated by a government action is therefore necessary to determine whether the action carries a forbidden meaning.

Lynch, 465 U.S. at 690, 104 S.Ct. at 1368 (O'Connor, J., concurring). Here, it is reasonable to conclude that not all of Mr. Roberts' students would receive a purportedly secular message. Mr. Roberts left his personal Bible on his desk in his fifth-grade classroom at all times and read it during class time. Like his Bible, the two other contested books were Mr. Roberts' personal property and were not used as part of the class curriculum. Further, the three books were the only books in the classroom that were demonstrated to contain religious themes; all three pertained to Christianity. Considering these factors in light of the environment of a fifth-grade classroom, the district court properly concluded that the books had the primary effect of advancing religion. See Edwards v. Aguillard, 482 U.S. 578, 584, 107 S.Ct. 2573, 2577-78, 96 L.Ed.2d 510 (1987) (noting that elementary schoolchildren `are impressionable and their attendance is involuntary').

When viewed from the eyes of the children in Mr. Roberts' class, the placement of the two books in the class library, the placement of Mr. Roberts' Bible on his desk, and Mr. Roberts' reading of the Bible during the reading period provided `a crucial symbolic link between government and religion.' Grand Rapids School Dist. v. Ball, 473 U.S. 373, 385, 105 S.Ct. 3216, 3223, 87 L.Ed.2d 267 (1985).

Under both the purpose and the effect prongs of the Lemon test, the district court properly determined that the censored actions, when viewed in their entirety, violated the Establishment Clause of the First Amendment. The censored conduct therefore substantially infringed on the rights of Mr. Roberts' students.

12. In Engel v. Vitale, 370 U.S. 421, 431, 82 S.Ct. 1261, 1267, 8 L.Ed.2d 601 (1962), the Supreme Court recognized that `[w]hen the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.' Such coercive pressure is surely at its peak when the religious minorities are impressionable children who look to their teacher as a role model.

Because `[t]he State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate

> religion,' Lemon, 403 U.S. at 619, 91 S.Ct. at 2114, we conclude that the school district's actions were not constitutionally infirm.

Roberts, 921 F.2d at 1057-58. See also Bishop v. Aronov, 926 F.2d 1066, 1077 (11th Cir. 1991). Mr. Helland's conduct was no different and was found by the Seventh Circuit to fail constitutional protection for the same reasons. There is clearly no conflict among the circuits.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

May 20, 1993

Peter Helland
P.O. Box ~~352~~ 382
Notre Dame, IN 46556

Dear Mr. Helland:

This letter is written as a follow-up to our conversation of Wednesday, April 14, 1993, with regard to your activity as a substitute teacher with the South Bend Community School Corporation.

I have taken the opportunity to review your file for the time that you have worked for us as a substitute teacher. The file shows that on numerous occasions building principals and teachers have indicated that you have not followed lesson plans and that your classroom management left something to be desired. Also, on some occasions you interjected reading religious-oriented materials into portions of your classroom presentation.

Since you have been a substitute with the South Bend Community School Corporation for some time, I am sure that you understand the need to follow the guidelines for employment as a substitute. Those are contained in the handbook for substitute teachers. If you have not reviewed this handbook, we can make a copy available to you.

More importantly, you have consistently received poor performance reviews from the individuals for whom you have

substituted. Those negative performance evaluations certainly give us some cause as to your continued use as a substitute teacher.

To this date, it is my understanding that you continue to be on the substitute list. However, you need to be apprised that a number of staff this year alone have requested that you do not return to their particular building. I cite no less than five different requests this school year from three different schools that you not return as a substitute.

Please take the time to review the substitute handbook.

Sincerely

/s/

Ralph Komasinski
Acting Superintendent of Schools